



Philan Holdings Limited v Mabea & 3 others (Environment & Land Case 443 of 2008) [2023] KEELC 20416 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 443 OF 2008
LC KOMINGOI, J
SEPTEMBER 28, 2023**

BETWEEN

PHILAN HOLDINGS LIMITED PLAINTIFF

AND

ZABLON MABEA 1ST DEFENDANT

TERESIA MBURU 2ND DEFENDANT

KENTMORE COMPANY LIMITED 3RD DEFENDANT

CITY COUNCIL OF NAIROBI 4TH DEFENDANT

JUDGMENT

1. By a plaint dated 17th September 2008 and amended on 11th February 2013, the Plaintiff claimed that it purchased property LR No. 209/2566 (herein after referred to as “the suit property”) situated at Nairobi Central Business District on 13th May 1994 at a public auction. This was pursuant to a court decree issued in Resident Magistrate’s Court Civil case No. 406 of 1992. Upon the purchase, a vesting order in favour of the plaintiff was issued on 29th May 1995 in the Resident Magistrate’s court. Consequently, the vesting order was registered against the suit property’s title and the Plaintiff entered in the register as the property’s proprietor.
2. However, sometime in June 1995, the previous owners of the suit property (Abdalla Hussein and Abdul Aziz Suleiman) filed High Court Miscellaneous Civil Application No. 583 of 1995 which stayed execution and quashed the vesting order on grounds that the Resident Magistrate’s Court lacked jurisdiction to issue it. Following this, the Plaintiff filed High Court Misc. Civil Application No. 1125 of 1997 seeking another vesting order which was duly issued on 9th April 2008.
3. The Plaintiff claimed that after filing the High Court application for issuance of another vesting order, they deemed it fit to seek extension of the lease which was due to expire in 2002. As such on 15th June



1998 the Plaintiff applied to the Commissioner of Lands for an extension of the lease. The request was approved vide a letter dated 31st July 1998 and the lease extended for an additional fifty (50) years subject to prescribed conditions. The Plaintiff complied with the conditions and processed a new Deed Plan No. 223005 was processed and signed by the Director of Survey. However, it was not issued with a Certificate of Title due to the pending suits in Court.

4. Nevertheless, the 3rd Defendant was fraudulently and irregularly given a new lease and Title over the suit property by 1st, 2nd and 4th Defendants sometime on 18th December 2007 and 28th August 2008 despite the pending suits, the Plaintiff having met stipulated conditions including paying land rates and a Deed Plan being in existence.
5. The Plaintiff thus claimed that it had suffered loss and damage for being deprived of the suit property and therefore sought:
 - i. A declaration that the Plaintiff is the bonafide owner of LR No. 209/2566 and is entitled to have the vesting orders given on 9th April 2008 registered against the Title.
 - ii. A declaration that the renewal of lease and subsequent registration in favour of Kentmore Company Limited was illegal, irregular, null and void.
 - iii. An order of injunction to restrain the Defendants or any of them whether by themselves, their servants, agents and/ or assigns from taking possession of or trespassing on or registering or in any manner whatsoever dealing with the suit property or any part thereof.
 - iv. Damages.
 - v. Costs of the suit with interest.
 - vi. Any other relief that this court may deem fit.
6. The 3rd Defendant in its Statement of Defence dated 2nd June 2016, denied the allegations stating that it acquired the suit property legally and procedurally having satisfied the conditions and paid relevant fees. Its case was that the previous lease having expired in 2002 they applied for renewal in 2007 and was given a fifty (50) year lease.

Evidence of the plaintiffs.

7. PW1, Justus John Bosco Kijirah the Plaintiff's Director testified on 9th July 2018 and adopted his witness statement dated 1st February 2012 as his evidence in chief. He produced the documents as evidence which were marked as Plaintiff Exhibit 1 to 25. He stated that the property situated on Biashara Street was acquired in May 1994 through a public auction on behalf of the 4th Defendant as advertised on The Standard and Daily Newspapers. He was then issued a Certificate of Sale by the auctioneer dated 16th May 1994 P. Exhibit 15 and a vesting order dated 23rd May 1995 vide CMCC 406 of 1992 produced as P. Exhibit 16 and the property registered in it's name. However, the vesting order was later quashed by High Court for lack of jurisdiction but upon filing another application H.C. Misc Civil App No. 1125 of 1997 they were issued with another vesting order on 12th June 2008 produced as P. Exhibit 2. He went on to state that before the initial vesting order was quashed, he had already registered it and a Provisional Certificate of Title dated 19th December 1995 issued P. Exhibit 1. They then sought extension of the property's lease which was to expire in 2002 as evidenced by the correspondence and other statutory requirements marked as P. Exhibit 8 to 11. It was until 2008 when he went to register the vesting order that he discovered that the 3rd Defendant had Title to the suit property.



8. He further stated there were four tenants on the suit property.
9. On cross examination he indicated that the initial vesting order which was cancelled was not produced in court. He confirmed that the provisional certificate adduced was issued on the basis of the initial vesting order. Further stating that when the property was purchased in 1994 the lease was valid because it was to expire in 2002 and in 1998 they sought an extension which was done as per P. Exhibit 5 although they did not have a vesting order at this time. He also confirmed that he could not have Title to the suit property without a valid vesting order and that is why the provisional title produced as P. Exhibit 13 was neither registered nor signed.
10. He stated that he got another vesting order in April 2008 which was presented in June 2008 and this is when he learnt that the 3rd Defendant had been registered proprietor of the suit property, under unclear circumstances. He stated the Title by the 3rd Defendant was signed on 8th December 2007 and registered on 25th August 2008. He noted that had the lease expired the property ought to have devolved back to the government but since he had sought an extension and the same granted for an additional fifty (50) years, as of 2008 the lease was still valid.
11. On re-examination he stated that when he purchased the suit property by auction and got the vesting order, the 4th Defendant who was not only the seller but also party to the suit did not raise an objection. He stated that in 1998 he was advised by his lawyer to apply for extension of the lease pending determination of the suit at the High Court so as to prevent the plaintiff from losing the property upon expiry of the lease. He went on to state that the 3rd Defendant's title was registered in August 2008 after he had already been issued with a vesting order in April adding that anyone dealing with the suit property would have known that there were pending suits.
12. PW2, Ezekiel Kathurima Narangu adopted his witness statement dated 4th May 2017. He stated that he worked as a legal conveyancing clerk at Koome and Company Advocates between and 2002 and had participated in the auction where the Plaintiff acquired the suit property. In 1995 he registered the vesting order issued by Court and processed a Provisional Certificate of Title which was gazetted in the Kenya Gazette No. 3812 of 1995 on 14th July produced as P. Exhibit 1.
13. He further stated, four years before expiry of the lease, he was instructed to seek extension which he did and there were correspondences to that effect. The extension was approved for a further fifty (50) years and the plaintiff complied with the conditions such as payment of rates. The Certificate of Title produced P. Exhibit 13 was also drawn but was neither signed nor registered due to the order from the court.
14. In 2008 when the vesting order was issued, he tried to register it in vain because the file was missing. He added that by this time, stamp duty had been paid and transfer undertaken as per P. Exhibit 25 being the transfer executed by the Deputy Registrar of the High Court.
15. On cross examination he confirmed that the provisional certificate was as a result of the vesting order that was set aside although another one was later issued by the High Court in April 2008. He indicated that in 1998 when the process of applying for lease extension was initiated the second vesting order had not been issued.
16. On re-examination he stated that neither Gazette Notice issued could neither the original Title could be traced. However, on the provisional Title there were several entries which any person dealing with the suit property could not miss to notice.
17. PW3, Gildine Gatwiri a Land Registrar based at Ardhi House stated that LR No. 209/2566 (IR No. 112178) was in the name of the 3rd Defendant Kentmore Company Ltd as at 25th August 2008 upon



expiration of the lease as per their record. She stated that she could not explain the procedure of the lease renewal which was a mandate under Land Administration and since it was a new grant she could also not tell who the earlier proprietors of the suit property were.

18. PW4, Robert Simiyu the Director Land Administration at the Ministry of Lands stated that he had worked there for twenty five (25) years. He stated that the Department of Land Registration was mandated with registration of leases and that the Chief Land Registrar could not register a document before being processed by the Land Administration.
19. In respect of LR No. 209/2566 he stated that the first lease was registered on 1st June 1903 and was to expire on 1st June 2002 and that the last registered lessee was Philan Holding Limited (the Plaintiff) having been registered on 29th May 1999. He stated that when a lease expires the registered leasee or owner would be the beneficiary. However, if the registered lessee did not apply for renewal then the lease could not renewed because application for renewal could only be done by the registered owner, agent or surveyor. A third party cannot apply for extension of the lease.
20. He stated that the provisional certificate of Title dated 19th December 1995 was issued to the Plaintiff before expiry of the lease and confirmed that the application for extension of lease dated 31st July 1998 was approved subject to some conditions. He also testified that the said letter of the approval was in their records as well as other consequent correspondences.
21. He however stated that the application for extension of the lease by the 3rd Defendant was not in their record adding that the letter dated 15th October 2007 adduced by the 3rd Defendant's approving extension of lease from 1st June 2006 was questionable because it was not in their records. He further stated that expired leases cannot be extended but only be renewed. He also maintained that the Department Land Administration processes a lease before the same is registered by the Chief Land Registrar and a Title issued. He added that their records did not have any lease processed in favour of the 3rd Defendant and that the approvals by surveyors were immaterial and non-existent. As such the Title in the 3rd Defendant's name issued by the Registrar of Titles on 25th August 2008 was not legitimate. He also stated that as of 8th February 1999 the lease had not expired and it is therefore illegal for a third party to have a deed plan before the lease expires.
22. On cross examination he stated that that the Director of Land Administration was the one tasked with renewal of leases and when nobody applies for renewal the interest in the land would devolve back to the Government of Kenya for preservation or for public use. And if somebody else applies for the lease then the previous owner is notified of the same. On the issue of provisional Title he stated that he had not perused the Deed file to know why it was issued. He stated that he was not aware that the vesting order was set aside by Court. And if a vesting order is quashed then registration is of no effect.
23. On re-examination he stated that if a third party applied for renewal of a lease, the previous owner would be notified and he had not seen any notice to the Plaintiff.

Evidence of the Defendants.

24. DW1 was Charles Kipkurui Ng'etich the Principal Land Registrar testified on 14th October 2019. He stated that his duties included registration of titles. He confirmed that as per the records the suit property was registered in the 3rd Defendant's name as of 25th August 2008 and confirmed that the certified copy was in the Defendant's documents. He went on to testify that having perused the register he did not find any anomaly with the procedure of registration since the 3rd Defendant applied for extension of lease which was granted. He confirmed that the original Title got lost and that the lease expired in 2002 and that a provisional title was not an extension of the lease. He added that the stamp



- duty paid did not indicate that IR No and was also not presented for registration. He went on to testify that there was an attempt to register a Title as well as stamp duty but the same was neither registered nor signed.
25. On cross examination he stated that extension is done when a lease had expired. He confirmed that he did not know how the 3rd Defendant learnt of the expired lease or when they applied for the extension although the procedure for registration was duly followed.
 26. He confirmed that Deed Plan No. 223005 dated 5th February 1999 was prepared by the Director of Survey although he did not know who applied for it. He confirmed that for a Deed Plan to be prepared it had to be applied for and he did not know who applied for it in 1999 when it was prepared also noting that the Deed Plan on the 3rd Defendant's Title was the same No. 223005 dated 5th February 1999 and could not tell if the 3rd Defendant had picked the Plaintiff's Deed Plan and got it registered.
 27. He went on to state that he could not confirm what happens once the Commissioner of Lands receives application for extension of lease if all the stipulated conditions have been met. He indicated that he did not know whether an advertisement for expiration of lease was put up on the local dailies and could also not confirm whether a valuation had done or not. He further confirmed that there were court orders in the register between 1961 and 2007 but was not aware of the court order dated 9th April 2008.
 28. On re-examination he stated that the vesting order had no legal effect because it was in reference to a lease that had already expired in 2002.
 29. The 3rd Defendant called it's Director Kennedy Mochere Kaburi as DW2. He adopted his witness statement dated 2nd June 2016 and produced 8 documents as evidence marked as Defendant's Exhibit 1 to 8 respectively. He stated that upon expiry of the lease, the previous owner did not apply for its renewal. Therefore, sometime in 2007 they applied for extension of the expired lease which was approved by the Director of Physical Planning and on 8th February 2007 the Director of Survey having no objection to the recommended the approval to the Commissioner of Lands. On 15th October 2007 the Commissioner of Lands informed the 3rd Defendant that the extension had been approved for another fifty (50) years upon which the 3rd Defendant made payments of all the necessary fees. Thereafter a Grant was processed in favour of the 3rd Defendant.
 30. On cross examination he stated that the suit property was a dilapidated condemned building by the City Council although he neither knew when it was condemned nor did he have the letter confirming the same in court. He confirmed that when he got Title to the property he tried to evict the tenants. At the time of the testimony, he was not sure whether there were tenants in the building.
 31. He stated that he submitted the application for extension of lease on 5th February 2007 and by the letter dated 8th February 2007 by the Director of Survey to the Commissioner of Lands the extension was approved. He confirmed that the Deed Plan Number 223005 was dated 5th February 1999 before the lease expired although he did not know who conducted the resurvey. He noted that it was not illegal to re-survey land before expiry of the lease.
 32. On being given an opportunity to look at the Plaintiff's evidence, DW2 confirmed that he acquired Title upon expiry of lease procedurally and did not collude with any officials. He stated that he was not party to HC Misc. Civil Application 1125 of 1997 He added that prior to processing his Title in 2006 or 2007 he conducted a search to determine the status of the suit property but did not have the certificate of search in court.
 33. He stated that he learnt that the lease to the suit property had expired when the owners did not apply for extension.



34. On re-examination he stated that the 3rd Defendant was not party to the proceedings that issued the vesting orders and was not aware of the same but he had already been issued title to the suit property by 2008.
35. The 4th Defendant participated in these proceedings but did not tender way evidence or file submissions.
36. At the close of oral testimonies the plaintiff and the 3rd defendant tendered final written submissions.
The Plaintiff's Submissions.
37. Counsel for the Plaintiff's in their submissions reiterated the plaintiff's evidence adding that when the Plaintiff got vesting orders on 9th April 2008 it tried to register it only to learn that the suit property had been registered to the 3rd Defendant despite the fact that it was occupied by the Plaintiff's tenants.
38. Counsel questioned and noted that the 3rd Defendant could not explain how it acquired title to the suit property and the reason was because the title was acquired/ issued illegally, unprocedurally and fraudulently. Reference was made to Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & another [2018] eKLR and Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others [2015] eKLR.
39. Counsel also noted that when the Plaintiff registered the initial vesting order, it was done in file number F.6290 which was the same file used to extend the lease in Plaintiff's favour. But when the 3rd Defendant's applied for extension of the lease in 2007 a temporary file number 6290/TC was opened without the original file being lost. Counsel submitted that this action was illegal and the 3rd Defendant ought to have ascertained the status of the property before dealing with it. Reference was made to Article 40(6) of *the Constitution*, Section 26 of the *Land Registration Act* and the following case laws Vincent Tumbo vs Sospeter Moindi Mokaya & Another [2019] eKLR, Munyu Maina vs Hiram Gathiha Maina [2013] eKLR, Esther Ndegi & Another vs Leonard Gatei [2014] eKLR.
40. Counsel concluded by submitting that the Plaintiff had evidenced that it acquired the suit property procedurally and was therefore lawfully protected. Reference was made to Raghbir Singh Sidhu vs Kipkemoi Arap Koskei & 5 others [2018] eKLR and Rejendra Saghani & Another vs Fairmile Investments Ltd & Another [2021] eKLR. As such the 3rd Defendant's title should be cancelled and the entries rectified to indicate the Plaintiff as the owner.

The 3rd Defendant's submissions.

41. Counsel for the 3rd Defendant in their submissions submitted that the Plaintiff did not prove its case on a balance of probabilities highlighting that the following evidence was not produced in court:
42. The alleged newspapers advertisement dated 7th May 1994 and 30th August 1994 for the sale suit property; decree issued in the RMCC No. 406 of 1992 for sale of the suit property; provisional title in the Plaintiff's name and search certificate.
43. Counsel went on to submit that property sold at a public auction could not be transferred by way of a vesting order but by way of restriction. However, that notwithstanding the vesting order registered on the property on 29th May 1995 was quashed by the High Court which in effect discharged the Provisional Title registered on 19th December 1995 and the Plaintiff could not seek for extension of a lease for property it did not own. Counsel went on to submit that even the vesting order issued by the High Court in Misc. Application No. 1125 of 1995 was void since it was not lodged by way of Originating Summons and was not presided over by a Puisne Judge. Adding that the said vesting order



which remains unregistered was issued in 2008 when the 3rd Defendant had already been registered as the proprietor as of 18th December 2007. Counsel also questioned the duration of time it took to prosecute a matter that was filed in 1997 only for the vesting order to be issued in 2008.

44. Counsel went on to submit that the rates clearance certificates issued between 2004 and 2008 to the Plaintiff were not only issued in the name of the previous owner but also at a time when the property had already been registered to the 3rd Defendant. Counsel also questioned authenticity of the renewal of lease document stating that it was neither executed nor registered. And that the Certificate of Sale dated 16th May 1994 did not show the purchase price of the suit property which ought to be the procedure in executing a decree for immovable property.
45. Counsel also queried that if the suit property was vested to the Plaintiff, what was the essence of the transfer document adduced by the Plaintiff indicating that the suit property was being sold by Ali Mohammed and 4 others to the Plaintiff for a consideration of Kshs. 25,000,000. Counsel also question the stamp duty form which had another co-transferee in the name of Shiloan Investments Ltd.
46. In conclusion, counsel submitted that it was protected by Section 25 of the [Land Registration Act](#) stating that it was the duty of the person applying for a vesting order to show the status of the suit property which the Plaintiff did not do citing Mohamed Shahanzi Butt & Another vs Kenya Revenue Authority & 2 others [2020] eKLR and that the auction process of selling the suit property was flawed and not according to the laid process as was enumerated in Electrical Marketing (Wholesale) Ltd vs Nairobi County Government & 2 others [2019] eKLR.

Analysis and determination

47. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are;
 - i. Was the plaintiff entitled to registration of the vesting order as per the order of 9th April 2008 vesting the suit property in it?
 - ii. Whether the Defendants acted lawfully in registering a grant IR. NO. 112178 on 25th May 2008 in form of the 3rd Defendant.
 - iii. Who is the bonafide owner of LR. NO.209/2566 situated on Biashara Street at the CBD Nairobi.
 - iv. Is the plaintiff entitled to the reliefs sought?
 - v. Who should bear costs of this suit?
48. The Plaintiff claims to be the bonafide owner of the suit property having purchased the same vide an auction and was issued with a sale certificate dated 16th May 1994 adduced as P. Exhibit 15. The Plaintiff went on to state that a vesting order was issued confirming the sale but it was later quashed. However, before the vesting order had been set aside they had registered it against the suit property's title and applied for a Provisional Title as evidence by P. Exhibit 1. The court has perused the undated Provisional Title adduced as evidence and notes that entry 16 on the Title is a vesting order registered on 29th May 1995; adduced as P. Exhibit 21 is a Gazette notice dated 14th July 1995 notifying the public of the intention to issue the Plaintiff with a Provisional Title if no objection is filed within 90 days. Entry 19 in the Provisional Title shows that it was issued on 19th December 1995. However, entry 17 and 18 are court orders for Misc. Civil Application No. 583 of 1995 which set aside the vesting order.



49. The plaintiff went on to state that they later applied for another vesting order at the High Court in 1997 as HC Misc. Application 1125 of 1997 and in 1998 during the pendency that suit they sought an extension of the lease term which was set to expire in 2002. The Plaintiff adduced the correspondence between its advocates and the Commissioner of Lands for the said extension between 16th June 1998 and 11th August 1998. The letter dated 31st July 1998 from the Commissioner of Lands to the Plaintiffs advocates reads:

Extension of Lease for LR No. 209/2566 Ngarima Road Nairobi

I refer to your letter dated 15th June 1998 applying for extension of lease.

I wish to inform you that the government has approved the extension for a further term of 50 years subject to the following conditions.

i. Payment of enhanced rent after valuation...

50. A further letter dated 11th August 1998 from the Commissioner of Lands to the Plaintiff's advocates reads:

... Further to my letter ... 31st July 1998 I wish to inform you that the annual rent has not been revised at Kshs. 118,100 per annum with effect from 1st August 1998. The other conditions are as follows: ...

51. It is noted that the 3rd Defendant questioned how the Plaintiff purported to extend a lease for a property that was not registered in its name. The Plaintiff also produced rent clearance certificates for LR 209/2566 for the years 2000 to 2007. The Court notes that the rent clearances between 2000 and 2004 were in the name of Ali Mohamed & Partners but the rent clearance certificate for 2007 was in the name of the Plaintiff. On 15th and 29th October 2001, the Nairobi City Council wrote a demand letter to the Plaintiff for payment of the arrears of rates (P. Exhibit 18). Produced as P. Exhibit 20 is a Plaint dated 29th August 2006, where the Nairobi City Council sued the Plaintiffs herein in Nairobi City Court Civil Suit No. 12 of 2006 for rates arrears up to 31st December 2006.

52. Also produced as P. Exhibit 2 is the vesting order given on 9th April 2008 in HC Misc. Application 1125 of 1997. It orders:

It is hereby ordered by consent:

1. That the property known as LR No. 209/2566 Nairobi sold to the Applicant on 13th May 1994 be vested absolutely in favour of the purchaser M/S Philan Holdings Ltd.
2. That the Deputy Registrar be appointed to sign and or seal any documents necessary to Philan Holdings Ltd.
3. ...”

53. Following the court order dated 9th April 2008, transfer documents were executed by the Deputy Registrar of the High Court in favour of the Plaintiff on 18th July 2008.

54. From the foregoing I find that the plaintiff was entitled to be registered as the owner of the suit property upon the vesting order.

55. The 3rd Defendant indicated that they had procedurally acquired the suit property after they applied for extension of the lease in 2007 and the same was renewed. It adduced correspondence to this effect.



56. On 8th February 2007 the Director of Survey. In a letter addressed to the Commissioner of Lands indicated:

Application for Extension of lease LR No. 209/2566- Biashara street Nairobi

Reference is made to your letter Ref No... dated on 31st January 2007 on the above subject matter. Re- survey has been done and deed plans issued. Deed Plan No. 223005 dated on 8th February 1999. Please note that thus office has no objection to the proposal...

57. By a letter dated 21st February 2007 is a letter from the Director of City Planning Department addressed to the 3rd Defendant stated;

Extension of lease on LR No. 209/2566- Biashara street Nairobi

Your above referenced application submitted in 5/2/2007 seeking permission for extension of lease on LR No. 209/2566 situated along Biashara street is recommended for approval by the Commissioner of Lands subject to NO conditions...

58. On 15th October 2007 the Commissioner of Lands informed the 3rd Defendant that the application for the extension of lease, had been approved for fifty (50) years with effect from 1st June 2006 subject to the outlined conditions which included payment of ground rent and other fees.

59. I agree with the plaintiff's counsel submissions that eh 3rd defendant has not explained how it acquired the title. DW1 told the court that the 3rd Defendant, applied for an extension of the lease in January 2007 using a temporary file 6290/TC. This means a temporary file was opened without any justifiable cause since the original file was in existence.

60. The most logical conclusion is that the temporary file was opened, to mask a corrupt scheme, to defeat the plaintiff's registered interest over the suit property. The defendants also relied on a copy of deed plan No.223005 instead of the original.

61. Section 26(1) of the *Land Registration Act* stipulates:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

62. This Court notes that the Title documents adduced by both the Plaintiff and the 3rd Defendant have similar entries and in particular reference to the court orders up until issuance of a Provisional Title. The Plaintiff has explained how that whole process was undertaken and how they continued paying land rent up until 2007 even before the vesting order for 2008 was issued. The 3rd Defendant's story begins in 2007 when they applied for extension of lease of the suit property which was approved. The 3rd Defendant did not indicate how they learnt of the expiration of the lease and stated that they were not aware that the suit property had an ongoing court case. The 3rd Defendant's advocate in his submissions even went on to question the length of time the Plaintiff took to prosecute the matter from



1997 to 2008 and its validity based on how it was lodged. This Court shall not get into the intricacies of suits and issues not before it. The fact is, a vesting order was issued and the order has neither been appealed nor set aside. Therefore, its validity is not a question for this Court to deal with.

63. This Court also notes that in 2006 the 4th Defendant (Nairobi City Council) distressed for rates and arrears against the Plaintiff and the rates clearance certificate issued in 2007 was in the name of the Plaintiff even though a vesting order had not been issued at this juncture. The Court marvels on the grounds in which the lease extension was approved in 2007 when there is evidence showing that the Plaintiff was duly making payments for the suit property. It is also puzzling how the 3rd Defendant failed to question the entries in the title document such as the Provisional Title and Vesting order and dig deeper to ascertain their veracity as well as their presence on the Title.
64. I find that the 1st and 2nd defendants acted unlawfully and unprocedurally in registering a grant No.112178 in favour of the 3rd defendant. In the case of *Munyu Maina Va. Hiram Githiha Maina* (2013) eKLR it was held that;
- “When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal”.
65. Having considered how the root of the parties’ title came about and the events leading to the issuance of Title to the 3rd Defendant, this Court associates itself with the Court of Appeal in *Wambui v Mwangi & 3 others* [2021] KECA 144 (KLR) where it held:
- “...Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme...”
66. I agree with the plaintiff’s submissions that the plaintiff having acquired the suit property for valuable consideration through a legitimate public auction done in execution of a lawful decree of the court attained a legitimate expectation, both procedural and substantive to have the lease extended in her favour and more so considering that the plaintiff applied for such renewal in 1998 which was four (4) years before the lease was due to expire. This was the import of the holding of the court in *Raghibir Singh Sidhu Vs. Kipkemoi Arap Koskei & 5 Others* (2018)eKLR.
67. I find that the plaintiff is the bonafide owner of LR. NO.209/2566. Having stated so, I find that the plaintiff is entitled to the reliefs sought.
68. In this regard, the provisions of Section 80 of the [Land Registration Act](#) are clear, that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated.
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) ...”
69. On the issue of fraud as claimed by the Plaintiff against the 1st and 2nd Defendants, it is trite law that he who alleges must prove as echoed by Section 109 and 112 of the [Evidence Act](#):



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- ...
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
70. The courts have also said over time that fraud is a serious allegation that should not only be pleaded but strictly proved. The Court of Appeal in *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR had this to say on the issue of fraud:

The law is clear as buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

71. Given the circumstances, this court is not convinced that the Plaintiff proved the alleged fraud against the 1st and 2nd Defendants. That notwithstanding, the Court has determined that the extension of lease for LR 209/2566 and subsequent issuance of title to the 3rd Defendant was irregularly done and therefore null and void.
72. In conclusion I find that the Plaintiff has proved its case against the Defendants on a balance of probabilities.
73. Accordingly judgement is entered for the plaintiff as follows:
- a. That a declaration is hereby issued that the Plaintiff is the *bonafide* owner of LR. NO.209/2566 and is entitled to have the vesting orders given on 9th April 2008 registered thereby reflecting the plaintiff as the registered owner.
 - b. That a declaration is hereby issued that the renewal of lease and subsequent registration in favour of Kentmore Company Limited (the 3rd Defendant) is illegal, irregular, null and void.
 - c. That the Chief Land Registrar is hereby directed to cancel, expunge all entries in their register in the name of the 3rd Defendant and that the register be rectified to reflect the plaintiff as the proprietor of the LR. NO. 209/2566 situated in Biashara Street in the Central Business District Nairobi.
 - d. That and order of Permanent injunction is hereby issued restraining the defendants or any of them whether by themselves, their servants, agents and/or assigns from taking possession of or trespassing on or registering or in any manner whatsoever dealing with the suit property.
 - e. That the costs of the suit be borne by the 3rd defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 28TH DAY OF SEPTEMBER 2023.



L. KOMINGOI

JUDGE.

In the presence of:

Mr. D. Mungata for the Plaintiff present.

N/A for the 1st and 2nd defendants.

N/A for the 3rd defendant.

N/A for the 4th defendant.

